

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TRAVELERS CASUALTY AND SURETY COMPANY as
Administrator for RELIANCE INSURANCE COMPANY,

Plaintiff,

vs.

DORMITORY AUTHORITY – STATE OF NEW YORK,
TDX CONSTRUCTION CORP. and KOHN PEDERSEN
FOX ASSOCIATES, P.C.,

Defendants.

DORMITORY AUTHORITY OF THE STATE OF NEW YORK
AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiffs,

vs.

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendant.

TRATAROS CONSTRUCTION, INC. and TRAVELERS
CASUALTY AND SURETY COMPANY,

Fourth-Party Plaintiffs,

vs.

CAROLINA CASUALTY INSURANCE COMPANY; BARTEC
INDUSTRIES, INC.; DAYTON SUPERIOR SPECIALTY
CHEMICAL CORP. a/k/a DAYTON SUPERIOR CORPORATION;
SPECIALTY CONSTRUCTION BRANDS, INC. t/a TEC;
KEMPER CASUALTY INSURANCE COMPANY d/b/a KEMPER;
INSURANCE COMPANY; GREAT AMERICAN INSURANCE
COMPANY; NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA; UNITED STATES FIRE
INSURANCE COMPANY; ALLIED WORLD ASSURANCE
COMPANY (U.S.) INC. f/k/a COMMERCIAL UNDERWRITERS :

:
:
:
:
:
:
: 07-CV-6915 (DLC)
: **ECF CASE**

:
:
: **ANSWER OF**
: **LUMBERMENS**
: **MUTUAL CASUALTY**
: **COMPANY improperly**
: **sued as KEMPER**
: **CASUALTY**
: **INSURANCE**
: **COMPANY d/b/a**
: **KEMPER**
: **INSURANCE**
: **COMPANY TO**
: **CROSS-CLAIM OF**
: **NATIONAL UNION**
: **FIRE INSURANCE**
: **COMPANY OF**
: **PITTSBURGH, PA**

INSURANCE COMPANY; ZURICH AMERICAN INSURANCE' :
COMPANY d/b/a ZURICH INSURANCE COMPANY; OHIO :
CASUALTY INSURANCE COMPANY d/b/a OHIO CASUALTY :
GROUP; HARLEYSVILLE MUTUAL INSURANCE COMPANY :
(a/k/a HARLEYSVILLE INSURANCE COMPANY); JOHN DOES :
1-20 and XYZ CORPS. 1-20, :
:
:

Fourth-Party Defendants. :

Comes now Fourth-Party Defendant Lumbermens Mutual Casualty Company ("LMC"), improperly sued as Kemper Casualty Insurance Company d/b/a Kemper Insurance Company,¹ and for its Answer to the Cross-Claim of National Union Fire Insurance Company of Pittsburgh, PA ("National Union") states as follows:

1. LMC denies that Fourth-Party Plaintiffs sustained any damages as alleged in the Fourth-Party Complaint. LMC also denies that it engaged in, and/or provided any, culpable conduct, acts or omissions, negligence, strict products liability, statutory violation, breach of contract, obligation or warranty regarding the allegations in the Fourth-Party Complaint.

2. LMC denies that National Union is entitled to indemnification or contribution from, and to have judgment against LMC for any verdict or judgment, or any portion thereof, that Fourth-Party Plaintiffs may recover against National Union. The remaining allegations of the Cross-Claim are not directed against LMC and therefore no answer is made to those allegations. To the extent that any of the remaining allegations contained in the Cross-Claim are directed against LMC, those allegations are denied.

WHEREFORE, LMC prays that this Court enter judgment against Cross-Claimant National Union as to all of its claims against LMC in the Cross-Claim of National Union, including that National Union is not entitled to indemnification or contribution from LMC for all or any part of any

verdict or judgment that the Fourth-Party Plaintiffs may recover against National Union and that this Court grant LMC its attorneys' fees, costs incurred in defending against this Cross-Claim, and such other relief that this Court deems just and equitable.

Affirmative Defenses

**FIRST AFFIRMATIVE DEFENSE
(Trataros is Not an Insured)**

National Union is not entitled to indemnification or contribution from, or to have judgment entered against, LMC because Trataros Construction, Inc. ("Trataros") is not a named insured in LMC Policy No. 4LS 001759-00 at issue and Trataros is therefore not entitled to a defense or indemnification from LMC.

**SECOND AFFIRMATIVE DEFENSE
(Trataros is Not an Additional Insured for Claims at Issue)**

LMC Policy No. 4LS 001759-00 at issue provides additional insured status where the Named Insured G.M. Crocetti, Inc. ("Crocetti") is required to provide insurance in a contract but only for liability arising from the named insured Crocetti's work for that party. Any liability of Trataros is the result of Trataros' conduct in insisting that Crocetti install terrazzo over Conflow over Crocetti's objections. Any liability of Trataros does not arise out of Crocetti's work but arises out of Trataros' decisions. Trataros is therefore not an additional insured under the LMC Policy for the Terrazzo claims and National Union is therefore not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

¹ LMC is one of the Kemper Insurance Companies, and issued the insurance policy at issue in the Fourth-Party Complaint.

THIRD AFFIRMATIVE DEFENSE
(Lack of Occurrence)

LMC Policy No. 4LS 001759-00 at issue requires that a covered claim arise out of an “occurrence”. Trataros ordered Crocetti, over Crocetti’s objections, to install terrazzo flooring over Conflow, knowing that it would fail. As such, the claim does not constitute an “occurrence” and there is no duty to defend or indemnify Trataros under the LMC Policy and National Union is therefore not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

FOURTH AFFIRMATIVE DEFENSE
(Your Work Exclusion Bars Any Coverage)

LMC Policy No. 4LS 001759-00 at issue contains an Exclusion titled “Your Work” which excludes coverage for any property damage that results from the work conducted by the insured and/or additional insured. If Trataros qualifies as an additional insured under the LMC Policy, which LMC denies, there is no coverage for any claim by Trataros against LMC and National Union is not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

FIFTH AFFIRMATIVE DEFENSE
(Failure to Provide Proper Notice)

LMC Policy No. 4LS 001759-00 at issue contains a notice condition that requires notification of an occurrence as soon as practicable and immediate notification of an offense that may result in a claim. The notice condition also requires immediate notice of a claim or suit. If Trataros qualifies as an additional insured under the LMC Policy, which LMC denies, Trataros failed to comply with this condition and therefore there is no duty to defend or indemnify Trataros under the LMC Policy, and National Union is therefore not entitled to indemnification or

contribution from, or to have judgment entered against, LMC.

**SIXTH AFFIRMATIVE DEFENSE
(Other Insurance)**

LMC Policy No. 4LS 001759-00 at issue contains provisions that provide that if there is any other collectible insurance available to an insured, the LMC Policy will be excess of the other collectible insurance.

National Union's claims are barred in whole or in part to the extent that there is other collectible insurance available to the insured.

**SEVENTH AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

The Cross-Claim fails to allege facts sufficient to constitute a claim against LMC.

**EIGHTH AFFIRMATIVE DEFENSE
(Failure to Properly Allege Indemnification)**

The Cross-Claimant does not satisfy all elements to properly allege indemnification against LMC.

**NINTH AFFIRMATIVE DEFENSE
(Failure to Properly Allege Contribution)**

The Cross-Claimant does not satisfy all elements to properly allege contribution against LMC.

**TENTH AFFIRMATIVE DEFENSE
(Other Defenses)**

LMC reserves the right to amend its Answer by way of adding affirmative defenses, counterclaims, cross-claims, or by instituting third party actions as additional facts are obtained through investigation and discovery.

WHEREFORE, LMC prays that Cross-Claimant take nothing by its Cross-Claim; that LMC

be dismissed with prejudice and awarded fees and costs incurred in defending this Cross-Claim; and that this Court enter a declaration that LMC is not obligated to provide insurance coverage for Fourth-Party Plaintiffs or any other party, and for any further relief that this Court deems equitable and just.

DATED: February 11, 2008

**TOMPKINS, McGUIRE, WACHENFELD &
BARRY LLP**

*Attorneys for Fourth-Party Defendant Lumbermens
Mutual Casualty Company ("LMC"), improperly
sued as Kemper Casualty Insurance Company d/b/a
Kemper Insurance Company*

140 Broadway
51st Floor
New York, New York 10005
(212) 714-1720

By: s/ Michael S. Miller
Michael S. Miller

DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury, that on February 11, 2008, he caused a true copy of the foregoing Answer, etc. to be served via electronic filing upon counsel for the various parties as follows:

JoAnne M. Bonacci, Esq.
DREIFUSS BONACCI & PARKER, LLP,
Attorneys for Fourth-Party Plaintiffs,
TRATAROS CONSTRUCTION, INC AND TRAVELERS
CASUALTY AND SURETY COMPANY
26 Columbia Turnpike - North Entrance
Florham Park, NJ 07932
Tel: (973) 514-1414
Fax: (973) 514-5959
email: jbonacci@dbplawfirm.com

David Abramovitz, Esq.,
ZETLIN & DECI-HARA, LLP
Attorneys for Defendants/Third-Party Plaintiff,
KOHNJ PEDERSON, FOX & ASSOCIATES, P.C
501 Second Avenue
New York, NY 10017
Tel: (212) 682-6800
Fax: (212) 682-6861
Email: dabramovitz@zdlaw.com

Robert R. Rigolosi
SEGAL McCAMBRIDGE SINGER & MAHONEY
Attorneys for Fourth-Party Defendant
SPECIALTY CONSTRUCTION BRANDS, INC. t/a TEC
830 Third Aye, Suite 400
NY, NY 10022
Tel: (212) 651-7500/(212) 651-7423
Fax: (212) 651-7499
email: rrigolosi@msm.com

Gary Wirth, Esq.

TORRE, LENTZ, GAMMELL, GARY & RITTMASER, LLP

Attorneys for Fourth-Party Defendant

CAROLINA CASUALTY INSURANCE COMPANY

100 Jericho Quadrangle, Suite 309

Jericho, NY 11753

Tel: (516) 240-8900

Fax: (516) 240-8950

Email: gwirth@tlggr.com

Robert Mark Wasko, Esq.

TORRE, LENTZ, GAMMELL, GARY & RITTMASER, LLP

Co-Counsel for Fourth-Party Defendant

CAROLINA CASUALTY INSURANCE COMPANY

226 West 26th Street, 8th Floor

New York, NY 10001

Tel: (516) 240-8900

Fax: (212) 691-6452

William Kelly, Esq.

GOLDBERG SEGALL, LLP.

Attorneys for Fourth-Party Defendant

DAYTON SUPERIOR SPECIALTY CHEMICAL CORP.

a/k/a *DAYTON SUPERIOR CORP.*

170 Hamilton Avenue, Suite 203

White Plains, New York 10601

Tel: (914) 798-5400

Fax: (914) 798-5401

email: wkelly@goldbergsegalla.com

Henry G. Morgan, Esq.

MORGAN, MELHUIS, ABRUTYN

Attorneys for Fourth-Party Defendant

OHIO CASUALTY INSURANCE COMPANY

651 West Mt. Pleasant Avenue, Suite 200

Livingston, NJ 07039

Tel: (973) 994-2500

Fax: (973) 994-3375

email: counsel@morganlawfirm.com

Donald G. Sweetman, Esq.

GENNET, KALLMANN, ANTIN & ROBINSON, P.C.

Attorney for Fourth-Party Defendants

*GREAT AMERICAN INSURANCE COMPANY,
AMERICAN ALLIANCE INSURANCE COMPANY,
AMERICAN NATIONAL FIRE INSURANCE COMPANY
and GREAT AMERICAN INSURANCE COMPANY OF NEW YORK*

6 Campus Drive

Parsippany, NJ 07054

Tel: (973) 285-1919

Fax: (973) 285-1177

Email: dsweetman@gkar-law.com

Ann Odelson, Esq.

CARROLL, MCNULTY & KULL

Attorney for Fourth-Party Defendant

UNITED STATE FIRE INSURANCE COMPANY

270 Madison Avenue

New York, NY 10016

Tel: (212) 252-0004

Fax: (212) 252-0444

Email: sds@melitoadolfson.com

S. Dwight Stephens, Esq.

MELITO & ADOLFSSEN, P.C.

Attorneys for Fourth-Party Defendant

ZURICH AMERICAN INSURANCE COMPANY

233 Broadway

New York, NY 10279

Tel: (212) 238-5900

Fax: (212) 238-8999

Email: sds@melitoadolfson.com

Martin Paul Lavelle, Esq.

GREEN & LAVELLE

Attorneys for Fourth-Party Defendant,

*NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA*

110 William Street

New York, NY 10038

Tel: (212) 266-5580/5881

Fax: (212) 528-0134

Email: martin.lavelle@aig.com

Diana E. Goldberg, Esq.
MOUND COTTON WOLLAN & GREENGRASS
Attorneys for Fourth-Party Defendant
COMMERCIAL UNDERWRITERS INSURANCE
COMPANY and ALLIED WORLD ASSURANCE
COMPANY (U.S.) INC.
One Battery Park Plaza, ⁹th Floor
New York, NY 10004-1486
Tel: (212) 804-4200
Fax: (212) 344-8066
Email: dgoldberg@moundcotton.com

Timothy B. Froessell, Esq.
HOLLAND & KNIGHT, LLP
Attorneys for Defendants/Third-Party Plaintiffs,
DORMITORY AUTHORITY- STATE OF NEW YORK
and TDX CONSTRUCTION CORP.
195 Broadway
New York, NY 10007
Tel: (212) 513-3484
Fax: (212) 385-9010
email: tbfroess@hklaw.com

Tricia Wishert, Esq.
RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, LLP
Attorneys for Fourth-Party Defendant,
HARLEYSVILLE MUTUAL INSURANCE COMPANY
(a/k/a HARLEYSVILLE INSURANCE COMPANY)
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07960
Tel: (973) 451-3862
Fax: (973) 451-3714
email: twishert@riker.com

DATED: February 11, 2008

s/Michael S. Miller
Michael S. Miller